STATE OF MICHIGAN

COURT OF APPEALS

DAVID ALLAN,

Plaintiff-Appellee,

v

GODFREY AGUWA,

Defendant-Appellant,

and

CONNIE ANDERSON, DEPUTY WASHINGTON, WARDEN HENRY GRAYSON, and BETTY JOHNSON,

Defendants.

UNPUBLISHED
January 12, 2001

No. 215858
Jackson Circuit Court
LC No. 96-075616-NO

DAVID ALLAN,

Plaintiff-Appellee,

v

MICHIGAN DEPARTMENT OF CORRECTIONS,

Defendant-Appellant.

No. 215860
Court of Claims
LC No. 96-016173-CM

Before: Meter, P.J., and Griffin and Talbot, JJ.

PER CURIAM.

In these cases tried jointly before the trial court without a jury, defendants Godfrey Aguwa and Michigan Department of Corrections (DOC) appeal as of right from a judgment

rendered in favor of plaintiff in the amount of $85,000. Specifically, defendants appeal from the trial court's previous order denying their motions for summary disposition. We reverse.

I

This case arises out of an April 13, 1993, injury that plaintiff suffered after having surgery performed on his ankle. At the time of the injury, plaintiff was a prisoner housed at the Charles Egeler Correctional Facility in Jackson. On April 7, 1993, plaintiff was admitted to Foote Memorial Hospital to have surgery (a bone fusion) performed on his left ankle because of a preexisting ankle condition.[1] Following the operation, plaintiff's heavily bandaged leg was placed in a non-weight bearing cast and plaintiff needed crutches to walk. One week later, plaintiff was released from the hospital and returned to Dwayne Waters Hospital, located on the grounds of the Egeler facility. Plaintiff was then sent to the control center where he was told to return to his former housing unit, Two Block. Plaintiff allegedly presented his medical orders indicating his need for a base-level cell[2] to defendant Aguwa, who was the assistant resident unit manager (ARUM) of Two Block.[3] However, plaintiff was placed in a first-level cell instead, and later that day, while descending the flight of stairs, plaintiff fell, reinjuring his left ankle.[4] The next day, plaintiff was assigned a base-level cell in Three Block.

Plaintiff filed suit in Jackson Circuit Court against defendant Aguwa,[5] alleging that in his capacity as ARUM of Two Block, Aguwa was grossly negligent in failing to place him in a base-level cell on his return from ankle surgery. Plaintiff further alleged defendant Aguwa was deliberately indifferent to his serious medical need of a base-level cell on his return from surgery in violation of federal law, specifically 42 USC 1983. Plaintiff contemporaneously filed a separate but virtually identical action for damages against defendant DOC in the Michigan Court of Claims and the cases were consolidated.

Defendants moved for summary disposition pursuant to MCR 2.116(C)(7), (8), and (10), asserting that they were protected by governmental immunity and were not deliberately indifferent to plaintiff's medical needs for purposes of 42 USC 1983. The trial court, without elaboration, denied summary disposition with regard to defendant DOC and, pursuant to MCR 2.116(C)(10), denied the motion as it pertained to defendant Aguwa. The action thereafter

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[1] In 1985, plaintiff sustained a crush-type injury to his left ankle in an automobile accident, requiring numerous surgeries prior to the April 7, 1993, surgery that is the subject of the current case.

[2] A base-level cell is a cell located on the correctional facility's ground floor; first-level or first-gallery cells are one level above the base-level cells.

[3] Aguwa testified at his deposition that as assistant resident unit manager, he counseled prisoners and played a role in placing prisoners who had special medical needs in appropriate cells.

[4] Plaintiff split his incision open, bent the screw that was inserted into his ankle and broke his fusion.

[5] Numerous other defendants were also named in defendant's complaint but dismissed from the suit prior to or during the trial.

proceeded to a bench trial where defendants were found liable to plaintiff.[6] A judgment in the amount of $85,000 plus costs and mediation sanctions was entered in favor of plaintiff.

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[6] The trial court held, in pertinent part:

> *The Court*: . . . I think that the State of Michigan, Department of Corrections was indifference [sic] to the needs of this man. I think that it was clear indifference and the State should be liable for his damages.
>
> I also find that Mr. Aguwa was grossly negligent in his conduct in this regard before and during this incident. . . . [I]t's just common sense to see a man that can't even balance himself – can't even put the left foot down to balance himself, he has to be on one leg all the time. You don't have to be a medical person to realize there's going to be problems with this, maybe even just walking on a flat floor, particularly in this case, where he is shaky and unsteady because of some internal or physical problem.
>
> I think the control tower, the Watters [sic] facility, Mr. Aguwa, Ms. Anderson, everyone that was involved in this case I think shares in the blame. And I think it's the responsibility of the State of Michigan to make things right for Mr. Aguwa.
>
> I do believe that there was – *make a finding that there was negligence in willful disregard for the safety of Mr. Allan by Mr. Aguwa and also by the Michigan Department of Corrections, and also in addition the Michigan Department of Corrections violated Mr. Allan's civil rights under Section 1043, 1983, and are responsible for his damages.*
>
> The Court makes a finding that Mr. Allan's damages to be at the rate of $5,000 a year for the first five years, $25,000 to this date and awards him the sum of $60,000 for future damages for a total of $85,000, together with costs.
>
> *Mr. Kulick (defense counsel)*: Thank you. *Your Honor, as to your last finding, is that a finding of negligence as to Mr. Aguwa or the state or gross negligence?*
>
> *The Court*: *Gross negligence.*
>
> *Mr. Kulick*: Thank you. *Your Honor, just one point of clarification the Court made no finding with respect to Mr. Aguwa and the 1983 claim. Do I understand, then, that the Court finds no liability with respect to that claim?*
>
> *The Court*: *As to that claim. The Court makes a finding that Mr. Aguwa was grossly negligent in all of his actions throughout this matter.*

(continued…)

Defendants Aguwa and MDOC now appeal as of right the trial court's November 12, 1997, order denying summary disposition.[7]

II

As a preliminary matter, we address plaintiff's argument that defendants' affirmative defense of governmental immunity should be deemed waived because defendants failed to file an answer, with an assertion of the governmental immunity defense, in a timely manner.

It is well established that "affirmative defenses must be raised in the responsive pleading or in a motion for summary disposition made before the filing of a responsive pleading." *Chmielewski v Xermac, Inc*, 216 Mich App 707, 712; 550 NW2d 797 (1996), aff'd 457 Mich 593; 580 NW2d 817 (1998); MCR 2.111(F)(3). Failure to raise an affirmative defense in either a responsive pleading or a motion for summary disposition before the filing of a responsive pleading constitutes a waiver of that defense. *Id*.

The record contradicts plaintiff's assertion that the affirmative defense of governmental immunity was waived. On August 5, 1996, defendant DOC filed its first motion for summary disposition in the court of claims, and defendant Aguwa filed his first motion for summary disposition in the circuit court. In these motions, defendants specifically asserted the defense of governmental immunity and appropriately cited the applicable statute. Additionally, these motions were filed before defendants' answer, which was filed on May 6, 1998. Therefore, defendants' affirmative defense of governmental immunity was not waived and review of defendants' issue raised on appeal is appropriate.

(…continued)

> *Mr. Kulick*: Yeah, I understand that part. It was just as to the 1983 that I haven't heard the Court say anything and that's why I asked. Thank you.
>
> *The Court*: Okay. [Emphasis added.]

[7] Defendant Aguwa also argues on appeal that (1) the trial court erred when it denied his motion for a directed verdict, (2) the trial court clearly erred in finding that he acted with gross negligence, and (3) the trial court erred when it found that his conduct was the proximate cause of plaintiff's injury. However, these assertions are not arguments in support of defendant's issue on appeal, in essence, whether the trial court erred when it denied his motion for summary disposition. Instead, the above assertions are actually separate issues of contention that were not identified in defendant's statement of questions. *Grand Rapids Employees Independent Union v City of Grand Rapids*, 235 Mich App 398, 409-410; 597 NW2d 284 (1999); MCR 7.212(C)(5). As a general rule, no point will be considered by this Court unless it is set forth in the statement of questions involved. *McGoldrick v Holiday Amusements, Inc*, 242 Mich App 286, 298; 618 NW2d 98 (2000); *City of Lansing v Hartsuff*, 213 Mich App 338, 351; 539 NW2d 781 (1995). Because the above issues were not set forth in defendant's statement of issues, they are not properly before this Court.

III

On appeal, defendant Aguwa argues the trial court erred in denying his motion for summary disposition pursuant to MCR 2.116(C)(10). Defendant Aguwa contends that reasonable minds could not differ in concluding that his conduct was not grossly negligent and, therefore, he is entitled to governmental immunity pursuant to statute.[8] We agree.

A trial court's grant or denial of summary disposition based on MCR 2.116(C)(10) will be reviewed de novo. *Clark v United Technologies Automotive, Inc*, 459 Mich 681, 686; 594 NW2d 447 (1999). Specifically,

> A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4). *Quinto v Cross & Peters Co*, 451 Mich 358; 547 NW2d 314 (1996).
>
> * * *
>
> MCR 2.116(G)(4) requires:
>
> "A motion under subrule (C)(10) must specifically identify the issues as to which the moving party believes there is no genuine issue as to any material fact. When a motion under subrule (C)(10) is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, judgment, if appropriate, shall be entered against him or her."
>
> A litigant's mere pledge to establish an issue of fact at trial cannot survive summary disposition under MCR 2.116(C)(10). The court rule plainly requires the adverse party to set forth specific facts at the time of the motion showing a genuine issue for trial.
>
> . . . The reviewing court should evaluate a motion for summary disposition under MCR 2.116(C)(10) by considering the substantively admissible evidence

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[8] In a related argument raised on appeal, defendant Aguwa also maintains that the trial court erred in denying his motion for summary disposition with regard to plaintiff's federal claim under 42 USC 1983. However, our reading of the record, see n 6, *supra*, indicates that the trial court ultimately found no liability on the part of defendant regarding this claim. Therefore, the issue is moot.

> actually proffered in opposition to the motion. A reviewing court may not employ a standard citing the mere possibility that the claim might be supported by evidence produced at trial. A mere promise is insufficient under our court rules. [*Maiden v Rozwood*, 461 Mich 109, 119-121; 597 NW2d 817 (1999).]

Generally, an employee of a governmental agency is immune from tort liability so long as the employee's conduct does not amount to gross negligence. Prior to the 1999 amendments, MCL 691.1407(2); MSA 3.996(107)(2) provided in pertinent part:

> Except as otherwise provided in this section, and without regard to the discretionary or ministerial nature of the conduct in question, each officer and employee of a governmental agency, each volunteer acting on behalf of a governmental agency, and each member of a board, council, commission, or statutorily created task force of a governmental agency shall be immune from tort liability for injuries to persons or damages to property caused by the officer, employee, or member while in the course of employment or service or caused by the volunteer while acting on behalf of a governmental agency if all of the following are met:
>
> (a) The officer, employee, member, or volunteer is acting or reasonably believes he or she is acting within the scope of his or her authority.
>
> (b) The governmental agency is engaged in the exercise or discharge of a governmental function.
>
> (c) The officer's, employee's, member's, or volunteer's conduct does not amount to gross negligence that is the proximate cause of the injury or damage. As used in this subdivision, *"gross negligence" means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.* [Emphasis added.]

In the instant case, the parties neither dispute that defendant DOC was engaged in the exercise of a governmental function nor that defendant Aguwa was acting within the scope of his authority as ARUM for DOC when plaintiff's accident occurred. Thus, in order to allege avoidance of governmental immunity, plaintiff must prove that defendant Aguwa's actions amounted to gross negligence.

"[E]vidence of ordinary negligence does not create a material question of fact concerning gross negligence"; to so hold "would create a jury question premised on something less than the statutory standard." *Maiden*, *supra* at 122. Once a standard of conduct is established, i.e., gross negligence, the reasonableness of an actor's conduct under the standard is a question for the factfinder, not the court. *Jackson v Saginaw Co*, 458 Mich 141, 146-147; 580 NW2d 870 (1998). However, if, on the basis of the evidence presented, reasonable minds could not differ, then the motion for summary disposition should be granted. *Id*. See also *Stanton v Battle Creek*, 237 Mich App 366, 375; 603 NW2d 285 (1999). Accordingly, we must scrutinize the proofs submitted by the parties pursuant to the summary disposition motion to determine whether reasonable minds could differ with regard to whether defendant Aguwa's conduct in failing to

place plaintiff in a base-level cell following his surgery amounted to gross negligence, or conduct "so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(2)(c); MSA 3.996(107)(2)(c).

The proofs submitted by the parties in conjunction with the summary disposition motion indicate that four physician's orders pre-dating plaintiff's surgery were on file at the Egeler facility, calling for placement of plaintiff in a base-level cell *prior* to his surgery. The proofs further show that in the six months preceding his surgery, plaintiff was moved six times to different cells by defendant Aguwa. One month prior to his surgery, plaintiff filed a grievance against Aguwa, alleging that this constant cell movement was a retaliatory tactic stemming from Aguwa's personal dislike of plaintiff. An investigation was initiated by the warden of the correctional facility, culminating in a report issued on March 29, 1993, finding that Aguwa "facilitated moving prisoner Allan to 1 block because he was upset that his credibility was questioned by prisoner Allan," and that despite base-cell openings, Aguwa did not notify anyone to hold a cell for plaintiff until one became available. In a memorandum sent by the deputy warden to Aguwa on April 5, 1993, just two days before plaintiff's surgery, Aguwa's actions in moving plaintiff were found to be "inappropriate" and a written counseling memorandum to that effect was placed in Aguwa's personnel file.

Focusing on the day in question, plaintiff testified at his deposition that before being admitted to Foote Hospital and pursuant to medical instructions, he was housed in a base-level cell. Upon his return to Two Block following his surgery, plaintiff explained to Aguwa that he had a slip instructing that he be placed in a base-level cell and insisted on being accommodated. Aguwa declined and assigned him a cell on first gallery. When plaintiff refused to lock up on first gallery, defendant Aguwa escorted plaintiff to Connie Anderson, the resident unit manager (RUM) and Aguwa's supervisor. Aguwa explained the situation to Anderson and in Aguwa's presence, Anderson made a phone call. Although plaintiff did not at that time know the identity of the person with whom Anderson spoke, plaintiff testified that when the conversation ended Anderson told him that there were no base-level cells available and "that the only opening was up on first gallery." Plaintiff then went to his assigned cell on first gallery for fear of receiving a "ticket." Later in the afternoon, when plaintiff was let out of his cell and proceeded down the steps to base level, he fell. Plaintiff's deposition regarding the train of events is significant to the issue at hand:

> *Q. (Defense counsel)* . . . You were housed on a base cell up to the date that you went to have your surgery?
>
> *A. (Plaintiff Allan)* Yes, sir.
>
> *Q.* Okay. And that was a base cell in Two Block?
>
> *A.* Yes, sir.
>
> *Q.* In Agler [sic] facility; is that right?
>
> *A.* Yes, sir.

Q. And your ARUM was Mr. Aguwa; is that correct?

A. Yes, sir.

Q. And who was your RUM?

A. Her name was Connie Anderson.

Q. Okay. And when you came back from surgery on the 13th, you were not reassigned back to that same cell. Is that what I'm to understand?

A. Yes, sir. No, sir, I wasn't.

Q. Okay. What's –

A. I was in the same cell. I believe it was from October of '92, all the way up until I left for Foote Hospital.

Q. Okay. Did they assign you to a cell?

A. No, sir.

Q. All right. What did they do? What did Mr. Aguwa do?

A. He had told me that there wasn't any base cells available.

Q. Okay. Anywhere in the prison or just in Two Block?

A. He didn't specify. He just said there wasn't any base cells available.
Q. Okay.

A. And he said: But we have an opening on first gallery. And I had told him that I had a base cell slip, and I'm supposed to be in a base cell and ask him if he could accommodate me. And he told me no.

Q. Do you know if he did anything?

A. Yeah. He gave me a direct order to lockup on first gallery and I refused.

Q. Did he give you a ticket?

A. No, sir. He took me over to the RUM, R-U-M.

Q. It's an acronym for Resident Unit Manager; is that right?

A. Yes, sir.

Q. Okay. So you went over to the RUM, that next step along the way; is that right?

A. Yes, sir.

Q. And this was this Connie Anderson person?

A. Yes, sir.

Q What happened there?

A. He explained the situation to her, and she had made a phone call. I don't know where the phone call was made to.

Q. Okay. She made a phone call?

A. Yes, sir.

Q. Okay. And what happened then? Could you hear her talking on the phone?

A. I was standing right there, but I don't remember what was said.

Q. Okay. Did she tell you who she called?

A. No, sir.

Q. Okay. What happened?

A. She basically said the same thing that the ARUM had said, that there was no base cells available, and that the only opening was up on first gallery; and that's where I was going to have to go to. And I wanted to go back to the control center, and they wouldn't let me, and they threatened to write me a ticket if I didn't go up there.

So they had somebody carry my bed roll up to the first gallery cell, and then I went up there and went to sleep.

Q. What time of day was this?

A. I believe it was in the early afternoon, I'm not sure.

* * *

Q. Okay. Do you have any reason to doubt that at some point in time she [RUM Anderson] did call [nurse] Betty Johnson, and that Betty Johnson told her you could remain on first gallery?

A. Yes, sir. And then she had called back after the fall and stated that I need to be on base.

Q. Okay. But my question is, do you have any reason to doubt that that happened?

A. No, sir.

Q. Okay. In other words – and not to confuse you and so no one claims that we're trying to trick you in any way – you have no reason to doubt that Connie Anderson made a call to Betty Johnson and asked if you could remain on first gallery or if you needed a base cell, correct, you have no reason to doubt that?

A. No, sir, I don't.

Q. And you have no reason to doubt that Betty Johnson said you could remain on first gallery?

A. No, sir.

Q. Okay. Do you know who Betty Johnson is?

A. Yes, sir, I do.

Q. And who is she?

A. She's an RN that worked over at Dwayne Waters Hospital.

Q. All right. And would she be presumably a person who would have access to your medical record and the physicians there, to ascertain whether or not that would be an appropriate response to the questions she was given?

A. Yes, sir, she is.

Q. All right. Thereafter, does Connie Anderson's response [to the grievance filed by plaintiff, see discussion *infra*] indicate that another phone call was received at about 5:30, to officers, not to Connie Anderson, but to officers, indicating that – again, from Betty Johnson, indicating that you were to be moved to a base cell?

A. Yes, sir. And then they – in a situation like that, from my experience, they convey that to the ARUM or the RUM.

Q. Do you know if either the ARUM or the RUM were at the prison facility at that time, of the receipt of that call at about 5:30 in the afternoon?

A. I'm not sure, sir. [Emphasis added.]

Plaintiff testified at his deposition that he initially refused an offer of a base-level cell on the day after his fall but that he was not offered a base-level cell "on the day that I fell."

On April 20, 1993, following his fall, plaintiff filed a grievance against RUM Anderson complaining of the failure to place him in a base-level cell following his surgery. The grievance reiterated, in pertinent part, the events in question:

> The control center sent me back to 6-1-2 [cell 6, 1st gallery, 2 block]. Mrs. Anderson offered a base lock in 3 block, I refused for a couple reasons. Prior to this I had a slip from Dr. Kenyon to be put on base – Mrs. Anderson stated "when you come back from surgery we'll put you on base in 2-south." I was also on medication not knowing the potential danger of being on 1st gallery. It was logged that first aide [sic] said to put me on base. I then went to 6-1-2 and layed [sic] down. After awile [sic] I awoke and was headed either to the chow hall or to first aide [sic] (I was heavily medicated) and fell down 1st gallery steps to base. The stitches split exposing my bone. I was taken to Foote emergency to be sewn back up. The doctor couldn't close the wound all the way because it was split wide. After I returned I was then moved to a base cell.

In response to plaintiff's grievance, Anderson wrote, in part:

> On 4-13-93 Allan returned to 2 block after ankle surgery. He was placed in 6-1-2 by the control center. I called first aid and asked if he needed to be on base at about 4:00 p.m. and was told by Betty Johnson [nurse] that he could stay on first gallery. At about 5:30 on 4-13-93 the officers received a call from Betty Johnson saying that Allan 181329 should lock on base.
>
> On 4-14-93 at 8:45 a.m. both i and me [sic] Aguwa ARUM spoke with Mr. Allan and offered him a base cell in another block because none were available in 2 block. He refused the move. At 1:25 P.M. on 4-14-93 Allan agreed to move to a base cell in 3 block.
>
> No staff person in the block observed Allan falling while in 2 block.

Additional documentary evidence submitted pursuant to the summary disposition motion included the "Block Two Logbook." The portions of the logbook recording the relevant events of the day in question stated:

> Allan (181329) is okay to remain on 1st gallery per Betty Johnson in 1st aid.
>
> * * *
>
> Betty Johnson (DWH-1st aid) called and said that Allen [sic] (181329) 6-1-2 should lock on base.
>
> * * *

> 6-1-2 (Allen) [sic] 181329 fell down the stairwell coming from 1st gallery to base on the north end of the bulkhead. E.R. notified . . . .

Nurse Johnson's instruction over the phone that plaintiff should lock on first gallery was logged between 3:50 p.m. and 4:20 p.m. Defendant Aguwa ended his day of work and left the Egeler facility at approximately 4:30 p.m. Johnson's subsequent phone call superseding her first instruction and advising that plaintiff should "lock on base" was received between 5:25 p.m. and 5:55 p.m. Plaintiff's fall occurred at approximately 6:50 p.m.

At his deposition, defendant Aguwa testified that he attempted to move plaintiff to a base-level cell on his return from surgery; however, the base-level cell was in another block and plaintiff refused this cell. Aguwa stated that because of plaintiff's refusal, he was not able to force plaintiff to move and therefore took plaintiff to his supervisor, RUM Anderson, to resolve the problem. Anderson called nurse Johnson, who instructed that it was appropriate for plaintiff to lock on first gallery.

Defendant contends on appeal that he took plaintiff to his supervisor rather than engage in a verbal dispute with plaintiff over where he would be placed, and that the "[v]ery act of taking Mr. Allan to Ms. Anderson is indicative of the absence of gross negligence on the part of Mr. Aguwa." In support of this argument, defendant further notes that it was medical personnel, nurse Johnson, not himself, who ultimately sanctioned plaintiff's placement in a first-level cell. Conversely, plaintiff contends that "the evidence was simply overwhelming that Mr. Allan being denied a base-level cell upon the day of his return from surgery was the product of retaliation on the part of Aguwa, still smarting from his second reprimand for his prior retaliatory treatment of Allan," and maintains that "[i]n the case at bar, even the most casual observer would have easily come to the unavoidable conclusion that Mr. Allan desperately needed a base-level cell."

Following a thorough review of the proofs submitted by the parties in conjunction with the motion for summary disposition, we conclude that the trial court erred in denying defendant Aguwa's motion for summary disposition pursuant to MCR 2.116(C)(10). The proffered evidence may have raised the specter of ordinary negligence on the part of Aguwa and other prison personnel, and it would appear that plaintiff satisfied his burden of showing that a genuine issue of fact existed regarding whether a base-level cell was offered to him on his return from surgery. However, evidence of ordinary negligence does not create a material question of fact concerning gross negligence, *Maiden, supra* at 122, and the issue of fact, in essence, whether Aguwa offered plaintiff a base-level cell, is not dispositive of plaintiff's legal claim of gross negligence because it was not material. *Smith v Globe Life Ins Co*, 460 Mich 446, 454-457; 597 NW2d 28 (1999); *State Farm Fire & Casualty Co v Johnson*, 187 Mich App 264, 267; 466 NW2d 287 (1990). Instead, it is the uncontroverted evidence that defendant Aguwa went to his supervisor to resolve plaintiff's cell placement that is material to the issue of gross negligence.

Both plaintiff and defendant Aguwa testified that when plaintiff demanded a base-level cell in lieu of the assigned first-level cell, Aguwa, rather than engaging in a verbal dispute and presumably sensitive to his recent reprimand, took plaintiff to his supervisor, RUM Anderson, to resolve the question of plaintiff's cell placement. After explaining the situation to Anderson, she made a call to nurse Johnson, and Johnson told RUM Anderson that plaintiff could be locked in a first-level cell. Plaintiff consequently proceeded to the first-level cell. When nurse Johnson

called back to correct her previous instruction and directed that plaintiff should lock on base, Aguwa had already left for the day and the call was received by other on-duty prison personnel. Unfortunately, plaintiff fell down the stairs before the order to lock on base was actually effected.

Therefore, because it is undisputed that Aguwa went to his supervisor to resolve plaintiff's cell placement on the day in question and followed the directive of his supervisor, who in turn had consulted with the hospital nurse, reasonable minds could only reach the conclusion that Aguwa's conduct was not so reckless as to demonstrate a substantial lack of concern for whether injury resulted to plaintiff. MCR 2.116(C)(10); *Maiden, supra*; *Jackson, supra*. Accordingly, the trial court erred in denying summary disposition on the basis of governmental immunity in favor of defendant Aguwa.

IV

Next, defendant DOC contends the trial court erred as a matter of law in denying its motion for summary disposition based on governmental immunity. Defendant DOC argues that it cannot be held vicariously liable for its employee's allegedly tortious conduct under the circumstances and further maintains that it cannot be held liable for a federal constitutional violation because DOC is not a "person" for purposes of proving a claim brought pursuant to 42 USC 1983. We agree.

A governmental agency is entitled to governmental immunity when it is engaged in the exercise or discharge of a governmental function unless an exception to such immunity applies. MCL 691.1407(1); MSA 3.996(107)(1). The scope of such immunity is broad and its exceptions are concomitantly narrow. *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 158; 615 NW2d 702 (2000). However, our Supreme Court has stated that a governmental agency can be held vicariously liable for the torts of its officers, employees, and agents if certain criteria are satisfied. *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 621, 623-624; 363 NW2d 641 (1984). To impose vicarious liability on a governmental agency, the individual tortfeasor must have acted during the course of employment and within the scope of authority. *Id*. at 624. In addition,

> Even when the tort is committed during the employee's course of employment and is within the scope of the employee's authority, the governmental agency is not automatically liable. Where the individual tortfeasor is acting on behalf of an employer, the focus should be on the activity which the individual was engaged in at the time the tort was committed. *A governmental agency can be held vicariously liable only when its officer, employee, or agent, acting during the course of employment and within the scope of authority, commits a tort while engaged in an activity which is nongovernmental or proprietary, or which falls within a statutory exception.* [*Id*. at 624-625 (emphasis added).]

See also, *Isabella Co v Michigan*, 181 Mich App 99, 105-106; 449 NW2d 111 (1989).

In the instant case, when plaintiff was denied a base-level cell upon his return from the hospital, defendant Aguwa was not engaged in a nongovernmental or proprietary activity but

rather was fulfilling his responsibility as ARUM to counsel and appropriately place prisoners. Moreover, given our conclusion that Aguwa is immune from liability, *supra*, Aguwa was not engaged in an activity that fell within a statutory exception to government immunity. Therefore, vicarious liability does not attach to render defendant DOC liable for the acts of its employee, *Ross*, *supra*, and summary disposition should have been granted in favor of defendant DOC pursuant to MCR 2.116(C)(7).

With regard to plaintiff's federal claim against defendant DOC, to obtain a remedy for a violation of the federal constitutional prohibition against cruel and unusual punishment, a plaintiff must bring the claim pursuant to 42 USC 1983. *Carlton v Dept of Corrections*, 215 Mich App 501-502; 546 NW2d 671 (1996). However, this Court has held that "[n]either the state nor a state official sued in an official capacity is a 'person' for purposes of a damage suit under § 1983." *Id*; *Smith v Dept of Public Health*, 428 Mich 540, 544, 581-582; 410 NW2d 749 (1987), aff'd sub nom *Will v Michigan Dept of State Police*, 491 US 58; 109 S Ct 2304; 105 L Ed 2d 45 (1989). Because defendant DOC is not a proper party for purposes of plaintiff's § 1983 claim, *Carlton*, *supra* at 502, defendant DOC was entitled to judgment as a matter of law pursuant to MCR 2.116(C)(8).

Reversed.

/s/ Patrick M. Meter
/s/ Richard Allen Griffin
/s/ Michael J. Talbot